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No. 93-841

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

THE CITY OF NEW YORK,

Petitioners,

v.

THE HERTZ CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI.

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Interest of the Amicus Curiae

This brief Amicus Curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of the City of Boston, Massachu-

setts (City) in support of a Petition for a Writ of Certiorari. The City asserts that the Court of Appeals' decision in this case will have significant impact on the City's ability to use its home rule powers to enact laws that affect the conduct of businesses within its boundaries. Accordingly, the focus of this brief is to apprise the Court of the nature of such impact.

Boston is the capital of Massachusetts and the largest city in New England. It has an economically and culturally diverse population of nearly 600,000 and on a daily basis an additional 500,000 people work in or visit the City. Additionally, millions of tourists visit the City annually and its renowned educational and medical institutions attract thousands more each year. *Boston Facts & Figures, 1990, Boston Municipal Research Bureau; Boston Transportation Department Progress Report, 1988.* Boston has the twelfth busiest airport in the country with more than 23 million passengers annually. *Final Generic Environmental Impact Report, Logan Airport, July 15, 1993.*

Cities and towns in Massachusetts have been given the right of self-government in local matters as well as rights concerning the conduct of their local government. These rights are embodied in the Massachusetts Constitution and are known as home rule powers. The Constitution of Massachusetts provides, in part, that "[a]ny city or town may, by adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter." Amended Article II, Section 6, Constitution of Massachusetts.

The City has used its home rule powers on many occasions to respond to specific problems affecting City residents and visitors. For example, in order to limit the adverse impacts

associated with construction activities in the City, an ordinance was adopted that restricts all such work to the hours of 7:00 A.M. to 6:00 P.M. on weekdays, except by special permit. Another ordinance controls and regulates street peddlers and hawkers by requiring them to be licensed, and one ordinance has banned the sale of certain types of canned spray paint and indelible markers to persons under 18 years of age to help combat the spread of graffiti.

On these and other occasions the City has enacted protections that respond to specific problems and benefit its citizenry. Each of these actions affects the conduct of businesses in the City, either by requiring them to conduct work only during specified hours or by barring sales to certain classes of persons. Although these enactments may have some economic impact on the regulated businesses and restrain competition to some degree, they are legislative determinations that should not result in judicial inquiries into how a particular local problem was addressed or remedied by local authorities. If left in place, the Court of Appeals' ruling in this case will do just that. On remand, the District Court has been directed to apply the rule-of-reason approach "to this emerging legal field" involving "a challenge to restraints on competition imposed by municipal activity." *Hertz Corporation* v. *City of New York*, 1 F.3d 121, 125 (2d Cir. 1993).

A judicial inquiry of this nature would usurp the local legislature's historical role in assessing local conditions and drafting legal remedies and insert the courts into areas properly left to those bodies. It could also subject municipalities to potentially costly and complex antitrust litigation. Accordingly, the rule-of-reason analysis under Section 1 of the Sherman Act should not be applied to the municipal enactment in this case, and the Court of Appeals' determination should be reviewed by this Court.

Pursuant to Rule 37.5 of the Rules of this Court, consent to the filing of this brief is waived due to the City's status as a political subdivision of the Commonwealth of Massachusetts and its filing by the City's authorized law officer.

Statement of the Case.

The statement of the case as set forth in the City of New York's Petition for a Writ of Certiorari is adopted by the City for purposes of this brief.

Reasons for Granting the Writ.

The City adopts the Reasons for Granting the Writ as presented by the City of New York in its Petition for a Writ of Certiorari and highlights the salient points.

The petition should be granted because the Court of Appeal erred when it concluded that New York City Local Law, Int. No. 71-A is a "hybrid" statute within the meaning described by this court in its decision in *Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986). See Sup. Ct. R. 10.1(c). Int. No. 71-A simply prohibits motor vehicle rental companies from using residence as a basis for charging additional rental fees. It does not provide these companies with any discretionary authority to make their own anticompetitive decisions. Accordingly, Int. No. 71-A qualifies as a restraint imposed unilaterally by a governmental entity and is therefore not an agreement or conspiracy to restrain trade. Thus, Section 1 of the Sherman Act is wholly inapplicable.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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